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Supreme Court of the United States

OCTOBER TERM, 1962

No. 37

MASSACHUSETTS, PETITIONER,

vs.

DONALD M. PAINTEN.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 3, 1963

CERTIORARI GRANTED FEBRUARY 25, 1963

Table of Contents.

Relevant docket entries	1
Petition for writ of habeas corpus	2
Transcript of hearing	8
Donald M. Painten	9
Direct examination by Mr. Nordlinger	9
Petitioner's Exhibits 1 and 2 marked	10
Cross-examination by Mr. Davis	12
Donald M. Painten, resumed	14
Direct examination by Mr. Nordlinger	14
Cross-examination by Mr. Davis	18
Redirect examination by Mr. Nordlinger	22
Emmett F. McNamara	23
Direct examination by Mr. Davis	23
Cross-examination by Mr. Nordlinger	29
Redirect examination by Mr. Davis	35
Cornelius J. Crowley	36
Direct examination by Mr. Davis	36
Cross-examination by Mr. Nordlinger	42
Opinion	45
Order	56
Motion for stay	57
Notice of appeal	57
Motion for issuance of certificate of probable cause under Rule 87 (A) and section 2253 of Title 28	58
Order	59

	Original	Print
Proceedings in the United States Court of Appeals for the First Circuit	60	60
Motion for stay and order thereon	60	60
Motion for remand and order thereon	60	60
Supplement to record on appeal filed	60	60
Motion for bail and order thereon	60	60
Hearing	60	60
Opinion, Aldrich, C.J.	61	61
Concurring opinion, Coffin, J.	65	64
Judgment	66	66
Motion for stay filed	66	66
Motion for bail filed	66	66
Memorandum and order of Court entered	66	66
Election filed and mandate stayed	66	66
Order re Bail entered	67	66
Clerk's certificate (omitted in printing)	68	67
Order allowing certiorari	69	67

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Civil Action No. 64-78-C.

DONALD M. PAINTEN,
Petitioner,
v.
COMMONWEALTH OF MASSACHUSETTS,
Respondent,

Relevant Docket Entries.

1964

Nov. 12 Petition for Writ of Habeas Corpus with Exhibits A, B, & C, filed.

1965

Dec. 30 CAFFREY, D.J. Hearing on Petition for Habeas Corpus, evidence, (pet'r. testifying) upon the joint request of counsel, memos to be filed by 2/4/66.

1966

Mar. 31 CAFFREY, D. J. OPINION FILED. Writ of Habeas Corpus is allowed.

31 CAFFREY, D. J. ORDER ENTERED. In conformity with Opinion of the Court filed this date, it is ORDERED: 1. The judgment of conviction on the basis of which petitioner is in custody is vacated. 2. That the Comm. of Mass. bring petitioner to a new trial on these charges within 60 days from this March 31, 1966, or discharge him from custody.

April 5 Defendant's Motion for Stay, filed.

5 Defendant's Notice of Appeal, filed.

6 Respondent's motion for issuance of cert. of Probable Cause under R 87 (a) and sect. 2253 of title 28, filed in the office of the clerk 4-5-66.

7 CAFFREY, D. J. DENIED: Deft.'s Motion for Stay. ALLOWED: Respondent's motion for issuance of certificate of probable cause under Rule 87 (A) and Sec. 2253 of Title 28.

7 CAFFREY, D. J. CERTIFICATE OF PROBABLE CAUSE ISSUED.

11 CAFFREY, D.J. ORDER ENTERED. "The Opinion filed herein on March 31, 1966 is amended as follows: On page 8, line 10, by inserting after the word *supra* "at 622 n. 5." On page 16, line 7, by striking "5" after 41 n. and substituting "12" therefor."

Petition for Writ of Habeas Corpus.

[Filed November 12, 1964.]

To the District Court of the United States for the District of Massachusetts.

Donald M. Painten, your petitioner, respectfully shows:

1. He is a citizen of the Commonwealth of Massachusetts.

2. He is unjustly and unlawfully detained and imprisoned in a prison known as The Massachusetts Correctional Institution, Concord, in the County of Middlesex, Commonwealth of Massachusatts.

3. The causes of such detention are certain orders of commitment, issued by Judge Frank J. Donahue of the Massachusetts Superior Court, ordering that your petitioner be imprisoned and detained in a Massachusetts Correctional Institution for concurrent terms of nineteen to twenty years and nine to ten years from March 24, 1958 and an additional term of two years to be served after the

expiration of the above. Copies of these orders of commitment are hereto attached and made a part hereof and marked Exhibit A.

4. Said restraint and imprisonment are illegal and in violation of Article Fourteen of the Amendments to the Constitution of the United States, and as grounds therefor your petitioner states under oath the following:

(a) the trial justice of the Massachusetts Superior Court erred by failing to grant or even to act one way or the other on your petitioner's motions for bills of particulars; these motions were filed because the indictments did not sufficiently describe the alleged offenses and thereby denied the defense the opportunity to properly prepare these cases.

(b) The trial justice erred by permitting the prosecution to discriminate against your petitioner because he could not raise bail, whereby during the trial before a jury, the petitioner was confined towards the rear of the courtroom in a wire mesh cage exposed to shame and ridicule, whereas, co-defendants who had raised bail were permitted to sit outside the cage and give the appearance of being sufficiently trustworthy to come and go as they pleased, thereby placing your petitioner in a prejudicial situation before the jury and rendering him, in addition, unable to hear much of what was going on at the witness box and at the Bench.

(c) The Commonwealth of Massachusetts erred by amending an indictment in the midst of the trial, thereby denying your petitioner his right to know before the commencement of the trial the essential components of the indictment and rendering him unable to properly prepare a defense.

(d) The trial justice erred in permitting the Commonwealth to defer sentencing of a co-defendant who had changed his plea from not guilty to guilty in the midst of the trial, and by further permitting the Commonwealth to call the said co-defendant as a State's witness immediately

after the change of plea and much before the imposition of sentence, thereby prejudicially affecting the testimony of this witness by holding over his head the threat or the reward of a sentence based on his degree of cooperation.

(e) The Commonwealth of Massachusetts erred by removing one of the co-defendants from the local jail for the purposes of private interrogation conducted by the Commonwealth's prosecuting attorney after the time indictments had been presented by the Grand Jury.

(f) The trial justice erred when he permitted your petitioner's prior record of imprisonment to be revealed to the jury in an indirect manner when your petitioner had elected to not testify for fear his record would unduly influence the jury to find him guilty unjustifiably. The trial justice compounded this error by conducting a line of questioning of a witness which brought out your petitioner's prior imprisonment, thereby giving to the jury an unwarranted impression that the Court was eliciting valuable testimony. The trial justice further compounded the error during his instructions to the jury when he referred to your petitioner having been an inmate of the Massachusetts Correctional Institution, and when your petitioner had not at any time during the trial taken the witness stand to open up thereby his past criminal record. Massachusetts law provides without question that a defendant's prior criminal record shall not be disclosed to the fact-finder where the defendant does not testify. Therefore the trial justice's error in this case clearly denied the petitioner equal protection of the laws.

(g) The trial justice erred when he permitted certain articles to be marked for identification and then taken as evidence and when he permitted these articles to be displayed and explained to the jury and when in fact it was evident that these articles had been seized in the petitioner's apartment and that the police had entered the apartment without displaying a search warrant and when it was

evident from the testimony of the police who conducted the search that, in fact, they had no search warrant, and had acted without probable cause. This error was rendered more prejudicial when certain dollar bills found during the search of petitioner's apartment were used by the Commonwealth in a misleading way to infer guilt on the part of the petitioner.

(h) The trial justice prejudiced petitioner's right to a fair trial by misleading the jury during his instructions to that body at the conclusion of the trial. Despite the fact petitioner had elected to not testify, the trial justice stated, "I think you will have (with you) Mr. Painten's record. I believe the records were introduced in evidence that he was twice convicted of rape. . . . .". Petitioner Painten had no record for rape, but irrespective of that fact any record which he had could never have been properly placed before the jury. The trial justice misled the jury further during his instructions by stating a completely erroneous recollection of a witness' answer. In this instance, the trial justice, during his instructions to the jury, mentioned that an eye-witness saw in the trial justice's words "these men over there" when in fact this witness as is shown by the transcript of the trial never said that he saw the defendants at this trial, including your petitioner, but in fact, this witness, a Mr. Glynn had testified in response to a question of the judge himself "you can't tell us what the men looked like that got out of the car I suppose can you?" to this Mr. Glynn, the witness, had testified, "No, I wasn't paying too much attention at that time to them." And during further direct examination by the District Attorney and cross-examination by various defense counsel, this witness had reiterated the fact that he had never had an opportunity to see either the faces of the people at a particular stage following the crime nor had he even seen enough of their bodies or the sides of their faces to be able to give

the court a description of the profile view or description of the build or stature of the men he had seen as he witnessed certain events following the commission of the crime. Therefore, the trial justices remarks to the jury at the conclusion of the trial grossly misled the jury in such a way as to commit serious error to the detriment of your petitioner.

5. Your petitioner has availed himself of all the remedies available to him in the Commonwealth of Massachusetts. Following the trial before the Superior Court, or trial court, the defendants had their cases reviewed by the Supreme Judicial Court of Massachusetts. The decision was adverse to your petitioner and it appears as Commonwealth v. Binkiewicz, Painten, and Hayes 342 Mass. 740, 175 N.E. 2d 473 (1961). A copy of this decision is appended to this petition and marked Exhibit "B". Your petitioner has raised all the points alleged in this petition for Writ of Habeas Corpus before the Supreme Judicial Court of Massachusetts, and on a preliminary hearing, that Court denied a full hearing on the merits and dismissed your petitioner's petition for Writ of Error and Assignment of Errors filed in the Supreme Judicial Court. On April 8, 1964, that Court did enter a final judgment disposing of the petition and assignments of error which your petitioner had sought to present before the Supreme Judicial Court of Massachusetts. A copy of the order of the Supreme Judicial Court and a copy of the petition for Writ of Error and Assignments of Error are appended to this petition and marked Exhibit "C". Your petitioner has no further avenue to seek redress in the Commonwealth of Massachusetts.

Wherefore, your petitioner prays that a Writ of Habeas Corpus be issued by this Court commanding the Superintendent of the Massachusetts Correctional Institution, Con-

cord, to produce the body of the petitioner before this Court at a time and place therein to be specified, then and there to receive and do what this Court shall order concerning the detention and restraint of petitioner, and that your petitioner be ordered discharged from the detention and imprisonment aforesaid.

Dated: October 22, 1964

DONALD M. PAINTEN

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. October 22, 1964

Donald M. Painten, being duly sworn, says that he is the petitioner named in the foregoing petition subscribed by him; that he has read the same and knows the contents thereof, and the said statements therein are true as he verily believes.

Sworn to before me:

LOUIS M. NORDLINGER
Notary Public (Seal)
Commission expires Sept. , 1967

"A."

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Misc. Civil No. 64-78-C

DONALD M. PAINTEN,
Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

CERTIFICATE OF PROBABLE CAUSE

I certify that there exists probable cause for an appeal by the respondent, Commonwealth of Massachusetts, in the

above-captioned case, in which the petitioner, Donald M. Painten, seeks the issuance of a writ of habeas corpus, and in which a decree in favor of petitioner has been entered by this Court.

ANDREW A. CAFFREY
Andrew A. Caffrey
U. S. District Judge

April 7, 1966.

Attest A True Copy
WILLIAM J LYONS
Deputy Clerk

Transcript of Hearing.

CAFFREY, D.J.

Appearances:
Louis M. Nordlinger, Esq., for the plaintiff;
William Davis, Esq., for the defendant.

Court Room No. 2,
U. S. Post Office and Court House,
Boston, December 30, 1965

[2] Mr. Nordlinger. Good morning, your Honor.

Mr. Davis, representing the Attorney-General's office, in the Commonwealth of Massachusetts, is in court with me before your Honor this morning. We are to present whatever evidence we have concerning the two allegations which your Honor has assigned for hearing this morning.

If your Honor will permit us to do so, I would like to present evidence concerning the first allegation and then have Mr. Davis present his evidence regarding the first allegation; and then present evidence on the second, rather than having the testimony covering both at once.

The Court. O. K.,

DONALD M. PAINTEN, *Sworn*

Direct Examination

Q. [By Mr. Nordlinger] Now, sir, you are Donald M. Painten, is that right? A. That is right.

Q. Presently confined at the Massachusetts Correctional Institution, Concord? A. Correct.

[3] Q. And, sir, you are the petitioner in this matter, is that right? A. I am.

Q. Now, sir, I would like to direct your attention to the date of the trial. Can you tell us first when was this trial that is the subject here, an approximate date is good— A. It started in June of 1958.

Q. Was this or was this not a jury trial? A. It was a jury trial.

Q. How many defendants were there? A. Four defendants.

Q. Do you have a recollection of the court room in which this trial was conducted? A. I do.

Q. Can you state to this Court, during the trial, where were you and the other three defendants? Name them, if you recall their names Where were you located in the court room during the trial? A. Michael Binkiewicz, co-defendant, George Hayes, co-defendant, and myself, were lodged in a cage situated nearly centrally in the court room. [4] The other co-defendant, John Bratkon, was seated to the right of the cage and outside of the cage, at the time of the trial, all during the trial.

Q. May I ask you, sir, whether any of the defendants testified for the Commonwealth in this case? A. Yes, John Bratkon testified for the Commonwealth.

Q. This is the defendant who is outside the cage? A. He was seated outside the cage, yes.

Q. Did any of the defendants inside the cage testify on behalf of the Commonwealth? A. No, no, sir.

Q. May I ask you, sir, if you remember where the jury was located in this court room? A. They were located to the right, diagonally to the cage, where the cage was situated, to a point to the right of the cage, toward the front of the cage, looking on an angle, toward the inhabitants of the same cage.

Q. Would it be correct to say, sir, from the Judge's point of view in that court room, if it were like this court room today, the jury would be located to the Judge's left, and therefore looking out to the cages, right? [5] A. If this court room were reversed, I will put it that way, if it were reversed, the Judge would be facing, say I were in the cage at this point, the Judge would be at the back wall, the jury would be to the right, that would be on the Judge's left.

Q. And on your right as you looked out of the cage? A. On my right.

Q. Now, sir, I am going to show you some photographs. I would ask you if you can identify any of these as representing the cage in which you were confined in that court room? A. These two photographs represent the cage that I was sitting in, yes.

Mr. Nordlinger. If your Honor please, may these be marked for identification, and taken as exhibits in this case?

The Court. Which do you want, identification or exhibits? Do you want them in evidence?

Mr. Nordlinger. Yes.

The Court. Exhibits.

Mr. Davis. No objection.

[Photographs of cage marked Petitioner's Exhibits 1 and 2 in evidence.]

[6] Q. Now, sir, taking your position, where you were in the cage, where your position is right now today, can you tell us about how far your position in the cage was from

the position in which your counsel was seated or located at the counsel table? How far? A. I would say near the distance of those chairs that are in back of you, the end of that table.

Q. So you would say something in the order of about 15 feet, approximately 15 feet? A. Probably closer to 20 or 18 feet.

Q. This trial went how many days, sir, do you recall? A. I believe it went thirteen.

Q. Were you in the cage throughout the entire period of the trial? A. Yes, except for the time of sentencing the last day.

Q. Sir, before the trial, at the time the trial was beginning, did you discuss your confinement in the cage with anybody, or make any request regarding your confinement in the cage? A. I spoke to one of the court officers. I asked him what was the reason that three of us were being put in the cage, one defendant was being left outside of the cage. He said this is the normal court procedure in cases such as this.

[7] Q. Did you make any request to be removed from the cage? A. I asked the court officer, why shouldn't I be able to sit so that, at the table with my attorney, I could consult with him? It never went any further than that. He said that is not the way it is done.

Q. At any time during the trial were you unable to communicate with your counsel or to contact your counsel because of confinement in that cage? A. Very definitely. In that court room, the way that was set up, my attorney's back was to me and he was facing the Court. On many many occasions I wished to communicate with him but because of the distance away and the fact of disrupting the court proceedings I had to let it go and try to make a contact and try to get my thought across to him when court

recessed. But, many times it was beyond any point of establishing anything I wished to, at that time.

Q. From your position in the cage, sir, were you able to hear all of the testimony from the witness stand? A. I was able to hear the testimony, mostly I heard the better part of it. I did have some difficulty in viewing the evidence that was being put in as exhibits or if evidence, I would have trouble seeing what it was because of the barrier that was in front of me, [8] because I had difficulty in seeing, but I could hear the testimony, yes.

Mr. Nordlinger. I have no further questions at this time.

Cross-examination

XQ. [By Mr. Davis] Mr. Painten, what crime were you charged with in 1958? A. Armed robbery, masked and disguised, larceny of an automobile, and conspiracy.

XQ. Armed robbery. Was it with a weapon? A. Allegedly.

XQ. Were you able to raise bail? A. No, sir.

XQ. What was your bail? A. It was quite high. I think it was $100,000.

XQ. Do you know whether or not Mr. Bratkon was able to raise bail? A. I don't. I don't believe he was. I believe he had a parole warrant violation that was outstanding against him, and this foreclosed any possibility of bail.

XQ. Mr. Painten, do you remember whether or not the [9] Judge charged the jury that your presence in the cage should not prejudice your case in any way? A. I don't recall that, no.

XQ. Do you recall whether or not your attorney at the time requested the Judge to make such a charge? A. No, I cannot say that I do.

XQ. You have also stated, Mr. Painten, your lawyer's back was to you. You were not able to communicate with

him. Tell me, was there a court officer facing you? A. There was a court officer seated beside the defendants, co-defendant Bratkon, outside of the cage. Now, whether there was a court officer or just the person taking the testimony, the court stenographer in front, I am not quite sure.

XQ. And this court stenographer, he was far back? A. No, he was up sitting below the Judge's bench.

XQ. The reason I ask, Mr. Painten, you said you spoke to the court officer about being in this cage? A. Yes. He transferred us from the lock-up outside of the court room, to the cage itself. He was the one that opened the door, the locked door and put us into the cage.

[10] XQ. He did not remain near you while the trial was in process, is that right? A. A matter, perhaps, of six feet.

XQ. Could you have gotten his attention? A. Probably, if I crawled over the other co-defendants.

XQ. Did you in fact get his attention and request he ask your lawyer to step back and confer with you? A. I don't believe I could have done it, because I could create some type of disturbance in the court room.

XQ. You stated you could hear but not see all the evidence presented? A. Without some difficulty, I could not, no.

XQ. Was your lawyer able to see the evidence presented? A. I believe he was.

Mr. Davis. No further questions, your Honor.

The Court. All right.

Mr. Nordlinger. If your Honor please, we have nothing further to present on this allegation.

Mr. Davis. I have nothing.

The Court. Do you want to go forward on the other one?

Mr. Nordlinger. Yes, if your Honor please.

[11] DONALD M. PAINTEN, *Resumed*

Direct Examination

Q. [By Mr. Nordlinger] Now Mr. Painten, directing your attention to a certain time before your trial at a time when certain items were taken from an apartment in which you were living and which you may recall were used as evidence during the trial, first, may I ask you, sir, where were you living prior to your arrest to stand trial on this matter? A. I was living on Dartmouth Street. I believe now the number is a little bit hazy.

Q. Can you give us the nearest avenue? A. Oh, yes, Columbus Avenue and Dartmouth Street. I was living near the Back Bay Station, I believe it was 120 Dartmouth Street.

Q. Were you living there, sir, alone or with another person? A. I was living there with another person.

Q. And, sir, what floor was this apartment on? First let me ask you if it was an apartment or a room? A. Yes, it was an apartment.

Q. How many rooms? A. Kitchen, living room, bedroom, bathroom.

[12] Q. On what floor, sir, of the building? A. The second floor, from the street.

Q. All right, sir. Now, can you remember the day of the week that these items were taken or that this entry was made, can you remember the day of the week? A. If my memory serves me, if we classify the first floor as one floor, the second floor, I was living on the third floor, if you want to count the mezzanine as the first floor. Now, as to the day and night, it was a Saturday, March 1st of 1958.

Q. And, sir, shortly before the officers came to your apartment, where were you an hour or so before they came? A. I had left my apartment about, I would say about eight o'clock at night, and I had gone out with a gentleman to

obtain some pizza and a chicken for supper. We were gone approximately an hour and I returned. On the return to the apartment I stopped at the corner of Dartmouth Street and Columbus Avenue. There I was let out of the car, the car was double-parked. At that time the officers in an unmarked car pulled up beside. They had to wait while I was getting [13] out of the car, to go in and conduct some business in a liquor store. I was buying some liquor for the weekend. That took about 30 seconds, for me to get out of the car and go into the liquor store. The car of the gentleman I was with proceeded on up, he went up, I do not know, to find a place to park. I went in, made my purchase, and returned to my apartment where I asked a friend there who was waiting for me, a woman friend, where the other fellow was that had been with me, whether he had returned. She said No, he had not. About five minutes after that he did return, he told me that he had been stopped by the police, his car had been searched, he had been searched and that was the reason why he was late getting back. So that was the end of that.

Q. Now at some time did persons representing themselves to be officers arrive at your apartment? A. Yes, I would say about five minutes after that they did.

Q. This is about how long after you arrived at the apartment? A. I would say about, approximately fifteen minutes.

[14] Q. Now, sir, were these the same persons you state were riding in an unmarked police vehicle when you entered the liquor store? A. I did not interview the officers at that time in the car. I do know it was a police car behind us.

Q. First tell us how many persons came to the door, what happened? A. Well, I was in the bathroom and a knock came to the door. Well, I said, "Wait a minute." And I finished what I was doing and I came out. I opened

the door and as I opened the door, three officers pushed by me right into my apartment and pushed me right along with them. I asked what this was all about. Now, when I answered the door I had no reason to believe it was anybody else except somebody that should belong in the apartment because there is a lobby door that locks downstairs. So it was my impression when I opened the door that it was somebody from one of the other apartments who had knocked at my door.

Q. How many persons were there at the door? A. I believe there were three officers.

Q. Were two in uniform, or not? A. Plain clothes.

[15] Q. Do you see any of those officers here in the court room today? A. I see one of them, I think, two, and I think you are blocking my vision.

Q. Pardon me?

The Court. You are blocking his vision.

The Witness. All right, I see two officers that were here.

Q. Can you point them out, where they are, on the spectators' bench? A. It was a long time since I have seen Mr. McNamara, I can remember him. I am not sure of this fellow, whether his name is White.

Q. Are you looking at the second bench? A. That is right.

Q. The gentleman sitting— A. Sitting close.

Q. On the left, as we view it? A. That is right.

Q. Now, will you tell us, sir, continue telling us what happened after you opened the door? A. There was some words exchanged and questions asked, which I was a bit confused, about all that was [16] happening and moments later, I would say a couple of minutes later, another officer arrived that had been situated out in the rear of the apartment. He came in, went through the kitchen, out onto the fire escape and came back in with a bag that contained two

guns, and some .32 and .45 caliber ammunition. Things sped along right at that time. I was taken down to Station 4.

Q. Let me stop you there for just a minute. When these people entered your apartment, did you make any inquiry of them why they were there, and did they answer you? A. Just there to look around.

Q. What did you ask them? A. I asked them, I said, "What do you want?" Naturally, I asked them, what do you want, what is the beef? and I was told, Oh, we are just here looking around.

Q. Do you remember either of the two officers you see in the court room today were the ones that answered you? A. I think Mr. McNamara answered me, yes.

Q. Did they say anything further to you while they [17] were in the apartment? A. Just conversation, just that—I don't really recall.

Q. Do you recall any of the officers leaving the area of the doorway and going somewhere else in the apartment? A. Yes, one of the officers, I don't recall which one, went searching above in the closets and in the dead area and in the living room, bedroom, and at that time we were then taken out, when the guns were produced, taken out and taken down to the station house. What took place after I left the apartment, I cannot state.

Q. Did you see the officers taking anything from your apartment other than what this officer from the outside retrieved from a fire escape, the weapons and ammunition, was anything else taken in your apartment? A. There were other articles taken but I did not see them take them out, no. I think that after I had been removed—from what I understand—after I had been removed to the station-house a further search was conducted of the whole apartment. [18] I think they took also at that time a box of .32 shells and at that time I was there, and then later on

and subsequent searches there were other articles removed, yes.

Q. Do you remember any of the material from your apartment appearing during your trial, to be used as evidence? A. Very definitely.

Q. What articles were used? A. There was a box of .32 caliber shells that was produced. There was a box of wax paper. There was the guns. There was serial numbers of money allegedly found in my possession, that came from a bank robbery.

Q. Now, do you recall, sir, again the transcript will speak for itself, I don't have a copy of it with me, I would like to ask you from your recollection whether you discussed the matter of the seizure of these articles and entry made by the police, whether you discussed this with your counsel? A. Yes, I did.

Q. Was anything done as a result of that, which you know about? [19] A. Well, nothing that I know about, no.

Q. During the course of trial when these articles were produced? A. There were obections raised.

Q. Do you recall this? A. I do recall my attorney objecting, yes.

Mr. Nordlinger. I have no further questions, your Honor.

The Court. All right.

Cross-examination

XQ. [By Mr. Davis] Mr. Painten, who lived with you on Dartmouth Street? A. A woman.

XQ. I am a little bit confused, Mr. Painten. I thought you said a minute ago when you arrived back at your apartment, a woman was waiting for you, you were looking for the fellow living with you? A. No, no, I was living with a woman.

XQ. Who was the fellow you were waiting for? A. Mr. Ash.

XQ. What is his first name? A. George.

[20]. XQ. George Ash. I notice you refer to Officer McNamara by name. Is it fair to say you had quite a few dealings with Officer McNamara? A. No, I would not say it was fair to say that.

XQ. You have had some dealings with him? A. Just this dealing, yes.

XQ. Just this? A. That is correct.

XQ. Also, according to your testimony, sir, you stated the officers came in with a bag containing a .32 caliber pistol and a .45 caliber pistol? A. That is correct.

XQ. Did in fact these guns belong to you? A. No, they didn't.

XQ. They did not? A. They did not.

XQ. Do you know whether or not they belonged to your friend? A. I could not say.

XQ. Were they in fact in your apartment? A. They were not found in my apartment.

XQ. Were they in your apartment? A. Yes, they were.

XQ. Do you know who they belonged to? [21] A. Yes, I know who they belonged to.

XQ. Who did they belong to? A. Mr. Ash.

XQ. Did he leave these articles in your apartment? A. He had them with him, yes.

XQ. Did he leave them in your apartment? A. Were they left? Yes, they were.

XQ. You also stated the police officers conducted a search later? A. They found a box of .32 caliber shells, is that right? A. That is correct.

XQ. Did these belong to you? A. Yes, they did.

XQ. But you did not own a gun? A. No, I did not.

XQ. Would you mind telling me what you were going to do with the .32 caliber shells? A. They were left there,

they were in my possession, I won't say they belonged to me. They were left in my possession by Mr. Ash at the time.

XQ. You are now saying they did not belong to you? A. Well, they say possession is nine-tenths of the law.

XQ. I am not interested in the law. I want to know [22] whether or not these shells belong to you? A. No, they did not belong to me, they were in my possession.

XQ. That is your answer to that question now? A. That is right.

XQ. How many police officers were there, sir? A. Four, I believe.

XQ. Did all four of them take you down to the station? A. I don't think so. I think one officer remained in the apartment.

XQ. Did they give you a reason for taking you down to the station? A. Suspicion of carrying a gun.

XQ. Is that the only charge? A. That is the only charge that I know of.

XQ. I think you mentioned something about some money, Mr. Painten, I did not quite get it all, tell me again what you said about money? A. Yes. They had a sum of money, $930-odd, that was in my apartment. This money was taken by the officers at the time of the search, along with the other articles, and as I say, this was on a Saturday. That following Monday morning I appeared in court. That money was returned to me when I was bailed out.

[23] XQ. Were you employed at the time, Mr. Painten? A. Self-employed.

XQ. What was your occupation? A. Laundramat.

XQ. You owned a laundramat or operated a laundramat? A. I was a partner in a laundramat.

XQ. Who was your partner? A. Michael Binkiewicz.

XQ. Was Mr. Binkiewicz also a co-defendant in the action which is— A. That is correct.

XQ. How long had you owned that laundramat? A. Well, I would say, negotiations were made for it in January.

XQ. 1958? A. The early part of February, that is right.

XQ. Is it your usual practice, Mr. Painten, to carry such large sums of money on your person or in your apartment? A. Well, I had made a loan previous to that time, and I did have that sum of money as a result of that loan, that particular loan, a loan of $1,000 I had made.

XQ. But the money was returned to you, is that correct? A. That is correct.

[24] XQ. You stated you were brought into court on Monday. Tell me what transpired there? A. There was probable cause held on the Grand Jury, for the Grand Jury, and bail set at $5,000.

XQ. Were you able to raise bail? A. Yes, I was.

XQ. You were subsequently released? A. I was released Monday morning, yes.

XQ. Were you ever brought to trial on these charges? A. I believe these same charges in Suffolk County were nol prossed in April of 1958.

XQ. You stated, Mr. Painten, that the guns that were abandoned from your apartment and also the shells were subsequently admitted into evidence at your trial on this charge of armed robbery? A. In Middlesex County, that is right.

XQ. Are you certain of that? A. Quite positive, yes.

XQ. Did you see the guns displayed in the court room? A. Yes, I did, what I could see of them.

XQ. Did you see the shells displayed in the court room, Mr. Painten? A. I saw the exhibit.

XQ. Was it a box of shells or single— [25] A. They were both.

XQ. Now, Mr. Painten, there were four defendants in this trial, is that correct? A. That is correct.

XQ. And evidence was introduced against each, individually and severally, severally and together, is that correct? A. Yes.

XQ. Now are you able to state categorically these weapons were introduced in evidence, were introduced against you? A. I could say that, yes.

XQ. Have you read the transcript of your trial, sir? A. I have.

XQ. Could you point out where in this transcript it says the guns were introduced against you? A. Well, testimony was given to the fact that the guns were taken from my apartment. There was also testimony given by the co-defendant Bratkon that there were guns that were in my possession, so I would assume that they were presented in evidence against me and against the other defendant, also.

XQ. The same applies for the shells, is that correct? A. I would say so, yes.

Mr. Davis. I have no further questions.

[26] The Court. All right.

Mr. Nordlinger. May I ask just a few more questions of this witness?

The Court. All right.

Redirect Examination

Q. [By Mr. Nordlinger] Mr. Painten, when you were taken out of the apartment and after the entry that has been discussed, you were taken to the police station, you stated? A. That is correct.

Q. And now, sir, while you were taken to the police station or at the police station or at any time prior to your being taken into it on the charges of possession of these weapons, were you questioned about the robbery of the Marlboro Bank? A. No.

Q. Are you certain of this? A. Positively. No.

Q. Can you state for us when is the first time anybody questioned you about the robbery of the Marlboro Bank? A. When I was arrested in March, around March 23rd, 24th, 1958.

Q. A couple of weeks after this entry, is that right? A. Yes, about three weeks.

[27] Q. Now, sir, it is true that you have had the transcript of the trial in your possession at the prison until you delivered it to me, is that right? A. Up until about a year ago, a year and a half ago.

Q. Have you read all of this transcript? A. I have read it, yes.

Q. Would you say that the transcript accurately represents all of the testimony and all of the proceedings during that trial? A. To the best of my recollection, I would say Yes.

Mr. Nordlinger. I have no further questions of this witness, your Honor.

The Court. All right. Is there anything else?

Mr. Davis. There is nothing else.

Mr. Nordlinger. Your Honor, we have nothing further to present on these allegations from the petitioner's side.

The Court. All right.

Mr. Davis. I do have some witnesses I can call, your Honor.

The Court. All right.

[28] EMMETT F. MCNAMARA, *Sworn*

Direct Examination

Q. [By Mr. Davis] Would you state your full name, please? A. Emmett F. McNamara.

Q. Your occupation, sir? A. I am a detective of the Boston Police Department.

Q. What is your assignment Division? A. I am assigned to District 4, South End, Back Bay, at the moment.

Q. Calling your attention to the early part of 1958, were you so employed? A. I was a plainclothes officer working out of the South End, District 4.

Q. Now at some time during 1958, the early part thereof, did you have occasion to come in contact with the petitioner, Mr. Painten? A. I did, sir.

Q. Give this Court the circumstances surrounding this, to the best of your recollection. A. To the best of my recollection, one evening I was traveling along Dartmouth Street towards Columbus Avenue with my partner, Herbert Maxwell, in an unmarked police car. In front of us was a Ford [29] sedan. I believe it was a two-door 1951 Ford sedan. There were two men seated in the front seat.

Q. Did you recognize the two? A. Not at this time. We were stopped at a light at Columbus Avenue. Across Columbus Avenue, there is a liquor store, on the right-hand side. We observed this car cross the intersection and pull up alongside the liquor store. One man got out. We stayed on the other side of Columbus Avenue and watched him.

Q. Let me interrupt you for one second. Was there something about this car or the occupants thereof that caused you to observe them more carefully? A. Well, our routine function is to be on the lookout, for a rash of liquor store holdups at the time, and other holdups, at the time. Both men seated in the car were wearing black soft hats. To me it did not look right. As a result, I figured I would give them a little surveillance. One man got out at the liquor store, went in and went up to the counter. It was a winter night. There was mounds of snow on the sidewalk. The car stayed outside with the motor running. [30] The man as he walked in the liquor store was plainly visible to

me, although I was across the street. I had a photograph in my breast pocket of my suit. I glanced at it, put it back. I stated to my partner, "That looks like this fellow," his name was on the back of the photograph, Donald Painten.

Q. Did you have more than one photograph on you at that time? A. In other pockets, but this particular picture was the only picture I had in this pocket.

Q. Could you tell the Court how it happened you had this photograph on you? A. About a week prior to this, I went upstairs to the detective room in Station 4, and on a desk I saw a photograph with just the name on it. I was curious. I made a phone call to Police Headquarters. I learned who this man was. I put it in the suit I had on, at the time, for future reference if I needed the photograph, routine police work.

Q. Fine. A. I then, while this man was making the purchase, I crossed the intersection because of the Ford, it [31] continued on, moved away and went up towards the Back Bay Station and turned around. We became a little more suspicious and followed the car. As the man turned around and looked at me, recognized me, he took off in a burst of speed, going back in the other direction. I swung the car around. We continued on.

Q. Did you give chase? A. We gave chase, the siren was going. We went up Appleton Street, down Chandler Street, I believe, back out Clarendon Street. We finally caught up with the car at the Gulf Station on Columbus Avenue and Berkeley Street and approached the car. I recognized the driver.

Q. Who was the driver? A. A man named George Ash. I told him to get out of the car. He did. I asked him, we could talk to each other, if we met in the street, what did he take off for? He stated, "You scared me."

Q. This was George Ash talking? A. "You scared me." That is George. In the car I could see a pizza on

the floor and a couple of chickens, they had fallen off the seat, [32] I imagine. We conversed with him for a couple of minutes and allowed him to go on his way. There was nothing wrong. I let him go on his way. He stayed there while I moved the cruising car toward Parker Square. Upon entering Parker Square, in the rear view mirror, I then noticed he turned the car around on Columbus Avenue and went back in the other direction. I got back in the neighborhood of the liquor store, and went in there. I showed the photograph to the man in the liquor store, asked him if he had ever seen this man. The clerk stated, "Sure, that is Mr. Painten, he was just in here and bought a bottle of liquor." I asked him, "Do you know where he lives?" He says, "Well, he lives on Dartmouth Street, 120-124, one or two buildings up before the barroom. I then moved the cruising car in the back of these buildings, a parking lot, and looked around. There was the Ford sedan we had chased earlier. Then I went to the doorbells on the street. I found Donald Painten or Mr. Painten's name on a doorbell. Maxwell and I were alone at the time. I knew Ash [33] and had heard of Painten.

Q. Before you go any further, tell us how you knew George Ash? A. I knew George Ash to have been involved in holdups in the past, and that he has done prison terms.

Q. Had you arrested him before? A. I don't believe I ever arrested him but I made myself known to him and he to me.

Q. I think you stated earlier, sir, there had been a rash of holdups, is that correct? A. There had been.

Q. Specifically, now, what places had been held up? I think you mentioned liquor stores? A. Liquor stores are quite common. There have been some loan company holdups in the daytime.

Q. As a result of what transpired, did you feel in your mind maybe George Ash and his companion had been involved in some way or other? A. In my own mind, I felt they were a couple of likely suspects for the holdup that had happened that day.

Q. This is your reason for going to Dartmouth Street, going to the apartment. Continue, sir. A. Knowing these two, I called for another car. Another car showed up with two other plainclothesmen. [34] I told one of them, Paul Rufo, "We are going up to see some fellows up in an apartment, if we can find them, will you watch the back of the building?" He left and went around the back of the building. We went up and found the apartment designated on the mailbox. I rapped on the door, and a voice said, "Who is it?" I said, "Police officers." The door opened about three inches, and Mr. Painten looked out at me. He saw us. I had my badge in my hand. He said, "Will you wait a minute?" I said, "Sure." He closed the door. As he closed the door, maybe ten seconds later I heard what to me sounded like a window opening and closing. He then, a few seconds after the door was opened, we were allowed to enter.

Q. Could you tell us who was in the apartment? A. George Ash was seated at the table. There is a room on the right, a bedroom, a woman was there. Mr. Painten was in the kitchen. Off to the left there is a pantry and stove. There was another man, I can't recall his name, but I had seen him around.

Q. There were three people in the apartment? A. Three men and a woman. So I approached him, sitting [35] at the table. George was there again. I asked who lived there. Painten volunteered it was his apartment. I made some inquiries. There was money on the table, not much, there was maybe $20, $30. In Ash's pocket, I noticed a bulge. I put my hand in his pocket. I found a handful of money, a couple of hundred.

Q. Was this a large sum? A. A couple of hundred dollars. It was $180, $200, in tens, and 20s. But it was crammed in the pocket, it was not folded. At that time I opened the window and hollered to Rufo, "Come on up, everything is all right." He hollered up to me, "Someone threw something out the window." A couple of minutes later he came in the apartment. There were two windows in the kitchen. We opened one of the windows and on the fire escape, below, was a bag. I believe Rufo went out the window, went down and brought the bag back in the window, opened it up and there was .45 and .32 bullets for both guns, they were wrapped in wax paper, it was a brown paper bag.

[36] Q. These were found on the fire escape? A. On the fire escape, the fire escape below. As a result of my suspicions, I told them they were under arrest for suspicion of a holdup on a loan company. I then looked in the bedroom, looked around. There was a bed there.

Q. Before you go further, I want to clear it up in my own mind, you told them they were under arrest for suspicion of holdup? A. That is right.

Q. At this time you went into the bedroom to look around? A. Yes. In the bedroom, I looked in the closet. I believe I found a box of bullets somewhere in that bedroom. There was a bed there with a box spring mattress on top. I lifted the mattress. In the bottom of the mattress there was approximately $900, $1,000, spread out neatly under the mattress. I asked Mr. Painten whose money was this? He stated that it was his. I asked him where did he get it. He stated he had gotten a loan from some finance company, I believe it was in Chelsea or Revere, on that side of the city. As a result, I [37] believe we counted the money in front of him and put it with the other property that we had.

Q. Was there any investigation made as to whether or not he had in fact borrowed this money from a loan company? A. I did not make one.

Q. You did not know of your own personal knowledge whether such investigation was made? A. I believe he had a transaction, to the best of my recollection, at some company over there, for that amount of money, either the day before or a couple of days prior, but I am not sure.

Q. Now after you found the money, did you take them down— A. Disposed with other officers, other officers arrived as a result of the radio call, plainclothesmen and uniformed men, and the men were removed to District 4. I don't recall whether I went with them at that time, but I did return to the station sometime later with property, money, guns, other evidence, and they were booked for suspicion, as I recall, they were booked for suspicion of armed robbery of the loan company. Later they were subsequently in routine fingerprinted and photographed and went to court the following day or the following Monday. [38] Q. Tell us what happened to this money after you left? A. When I went home, this money went into the Captain's office and it was examined by FBI agents and other officers, which I learned when I came back to work.

Q. Was this money subsequently returned to Mr. Painten? A. This money was.

Q. Do you know whether or not the FBI agents took the serial numbers of this money? A. I do know that.

Mr. Davis. I have no further questions.

Cross-Examination

XQ. [By Mr. Nordlinger] Mr. McNamara, you stated to the Court you had some suspicion of this petitioner's involvement in holdups prior to your entering his apart-

ment that night, is that right? A. As I get your question, you mean particularly him?

XQ. Yes. A. I would say No.

XQ. So he was not under suspicion for holdups at that time? A. Not he alone. My function is, there is plenty of other fellows around the South End that could possibly have gone into the same category, if they come across my path. [39] These two happened to be in front of me. My suspicions were aroused at that particular time.

XQ. Did you have any particular reason to suspect Mr. Painten was involved in a robbery at that time? A. Well, I knew of the description of the men in the holdup, as a result of information received on our daily manifold. As I recall, they fitted the description; two white men, one tall, one a little shorter.

XQ. Would you say your suspicions would give you reasons to have picked up Painten when you saw him get out of the car and enter the liquor store? A. No, no, sir, not at that time.

XQ. He was not sufficiently under suspicion to apprehend him at that time for any particular crime, was he? A. I felt I would keep him under surveillance for a while, under the circumstances, the car with a motor running outside a liquor store, a man going inside. I had a photograph of the man.

XQ. That concerns a possibility of a robbery of a liquor store, which you thought might occur? A. That is correct.

XQ. At that time the car stopped, he got out of the car to enter the liquor store. You were behind him. [40] Did you think you had any reason to arrest him for any particular crime?

The Court. Before he went to the liquor store?

Mr. Nordlinger. That is right, your Honor.

The Witness. At that time, I say No.

XQ. Now, sir, did you observe Mr. Painten or did any information come to you in the moments after you saw Mr. Painten enter the liquor store, did any information come to you to give you reason to arrest Mr. Painten for a crime or for suspicion of a crime? A. No, but I could add to that.

XQ. Pardon me? A. No, to that question, but I would like to add to that question.

XQ. Just a moment now. You go ahead, let me give you the opportunity now. State what you want concerning that. A. If Painten had not stopped, gone into the liquor store, I would have approached the car and stopped them and made some inquiries, and I believe I would have taken them to Station 4 on suspicion of that holdup, that day.

XQ. You did follow the Ash car or Ash driving the car? A. This is after he let Mr. Painten off.

XQ. You did not take Ash down to the station? A. No, sir.

[41] XQ. You had no intention at the time you let Ash go in the Gulf Station, you had no intention of taking him to the station at that time? A. I felt he would lead me back to Painten, and that is what he did.

XQ. Was that the purpose of your letting him go? A. Yes, sir.

XQ. When Mr. Davis was examining you, you stated you watched in the rear view mirror, you were leaving the scene, suddenly you saw in your rear view mirror, suddenly you saw he turned around, that is what brought you to follow him, is that correct? A. I know, yes, sir.

XQ. Had you observed when you arrived back at the address on Dartmouth Street, Painten's name was right on the door? A. On the mailbox.

XQ. You stated you saw it. Had you made any effort to locate Mr. Painten before that date? A. No, sir.

XQ. What reason did you have for locating Mr. Painten that evening? A. When I started my tour of duty, I did not have [42] Mr. Painten in particular mind, it is when I saw him in the car in front of me that they became suspicious to me.

XQ. What reason did you have for going to his house that evening? A. I felt he might be involved with Ash in holdups.

XQ. But you did not feel he was involved to such a degree you wanted to arrest him, when he left the car and went into the liquor store? A. No, sir.

XQ. Something happened between the time he entered the liquor store until you arrived back, from stopping George Ash, you arrived back in the apartment, something happened evidently to give you reason to feel Painten had been involved in a holdup. Can you tell us what that is? A. Ash's actions.

XQ. By "Ash's actions," you mean fleeing the scene where you approached his vehicle? A. That is correct.

XQ. Now, sir, when you went to the apartment on Dartmouth Street, did you make any effort either by radio or did you consult with anybody in your police department [43] regarding the obtaining of a warrant to enter that household? A. No, sir.

XQ. Was it your opinion, Mr. McNamara, something was going on in that household to give you reason to enter the household without a warrant? A. Yes, sir.

XQ. Can you state to the Court what that was? A. Well, in that household, it has people with a background, people that I knew were in there, I might be able to solve a string of serious crimes.

XQ. You stated while you were being examined by Mr. Davis, that you knew Painten over a period of time because of his involvement in some holdups, is that right? A. No, I did not say that.

XQ. Well, where did you come in contact with Mr. Painten then? A. I observed Mr. Painten in the vicinity of a cafe on Columbus Avenue, standing outside, inside of the bar many times and in the vicinity of the South End, and in company with other people whom I did know.

XQ. So at no time did you ever have a case involving Mr. Painten for robbery or armed robbery? A. I don't believe I ever had him for another crime.

[44] XQ. Before this? A. No, sir.

XQ. And so, regarding Mr. Painten's background, personal background, as far as your knowledge is concerned, is it fair to say that it gave you no reason to feel he should be involved in holdups at the time of this entry? A. I felt that he could be involved in recent holdups.

XQ. But you had no information he had been involved in any holdups before that time? A. I had no information from anyone.

XQ. Were you familiar with his record? Do you know whether or not there were armed robberies on his record before that time? A. No, I am not familiar with his record to know what it was. I know he had one as a result of the photograph.

XQ. I am sorry. A. I knew he had one. What it is—

XQ. What, sir? A. He had a record.

XQ. For what, sir? A. What it was, I don't know. I don't recall, but I know he had one because I had a photograph in my pocket, [45] taken at police headquarters.

XQ. You did not know whether or not he had any record at all for armed robbery or robbery? A. I don't recall what his past was.

XQ. Now, sir, when you entered the apartment, did you ask permission of Mr. Painten to conduct a search of the premises? A. I don't believe I did.

XQ. You did, sir, conduct a search while you were there, or the officers accompanying you conducted it? A. I was in the search of the apartment.

XQ. When you first approached the apartment house, the entry, was there a door prior to ascending the stairs to the third floor, was there an outer door to the street? A. The double glass doors, and then a stairway upstairs.

XQ. Did you ring the bell? Was there a bell for you to ring to have the door open to gain admission? A. I did not ring the bell.

XQ. Now, how did you gain admission? A. I went up and knocked on the door.

XQ. How did you gain admission to the outer door? A. They were open.

[46] XQ. They were not locked? A. No, sir.

XQ. Now, sir, if you recall, how long prior to the time of this entry and this search, how long before this did these holdups occur that were on your mind that evening? A. Sometime during the day.

XQ. That very day? A. As I recall, yes, sir.

XQ. When you heard about these holdups and realized they were part of your business, did you then have this petitioner Painten under suspicion? A. No, sir.

XQ. Did you have George Ash under suspicion? A. No, sir.

XQ. At the time you saw George Ash and Painten together in the car by that liquor store, did you have them under suspicion for these finance company robberies? A. No, sir.

XQ. May I ask you, sir, what gave you reason for the search of George Ash's car in which you stated you found the chickens and the pizza in the car, did you find any weapons in the car when you stopped it, incidentally? [47] A. No, sir.

XQ. Did you frisk the driver, George Ash? A. No, sir.

XQ. You did not look for a weapon on his person? A. I could see he had none.

XQ. When he returned to the South End, as you might expect, for the company of Painten whom he had left just

earlier, what gave you reason to feel you had the grounds to enter the apartment when you did not have reason to pick them up when they were together in the car? A. When I first saw them, and saw Painten going in the liquor store, I felt this might be a liquor store holdup. The situation changed. Shortly after, when Ash panicked and gave us a chase around the South End, and now we have them together in the apartment and the holdup of the loan company is in my mind now, since there is no liquor store holdup, and I find out he is living there, these things in my mind lead me to arrest him for that holdup.

XQ. That is the only basis, the reason for arresting him for the finance company holdup? A. Because of their records and association and the [48] officer coming in, discovering the guns.

XQ. Did he discover the guns before you entered the building? A. No, sir.

XQ. Before you entered the apartment? A. No, sir.

XQ. Rufo's discovery of something being thrown out the window had nothing to do with your entering the building or entering the apartment, did it? A. No, sir.

Mr. Nordlinger. I have no further questions.

Redirect Examination

Q. [By Mr. Davis] I want to tie up a couple of loose ends, Mr. McNamara. Stop me if I am wrong. Stopping in front of the liquor store, the subsequent chase of the car driven by Mr. Ash, upon entering the apartment and having one fellow discover the guns, all of these factors were taken into consideration by you and warranted a suspicion of robbery, is that correct? A. That is correct.

Mr. Davis. Thank you. I have no further questions.

[49] Mr. Nordlinger. Mr. McNamara, when you agree to this question, are you stating again that the discovery of the guns on the fire escape influenced your decision to enter that apartment?

The Witness. No, sir.

Mr. Davis. He did not say that.

The Court. He said it influenced his decision to make the arrest, as I understood it. Is that correct, Mr. Officer?

Mr. Nordlinger. I have no further questions.

The Court. You say your discovery of the guns influenced your decision to make the arrest. Mr. Nordlinger asked you if it influenced your decision to enter the apartment. Mr. Davis asked you if it influenced your decision to make the arrest.

The Witness. To make the arrest, yes. They were found after we entered the apartment.

The Court. All right. O.K.

Mr. Nordlinger. No further questions.

Mr. Davis. I have one further witness, Lieutenant Crowley.

The Court. Go ahead.

[50] CORNELIUS J. CROWLEY, *Sworn*

Direct Examination

Q. [By Mr. Davis] State your full name, please? A. Cornelius J. Crowley.

Q. You are a Lieutenant of the State Police? A. Detective Lieutenant.

Q. What is your assignment, sir? A. Now?

Q. Are you assigned to headquarters? A. Yes, I am.

Q. What was your assignment back in 1958? A. I was a detective assigned to the office of the District Attorney, Middlesex County.

Q. Sometime during the early part of 1958, did you have occasion to come in contact with the petitioner, Donald Painten? A. Yes, sir.

Q. Tell the Court how this came about? A. Yes, sir. I was conducting an investigation of a robbery of the Peo-

ple's National Bank in Marlboro. I was at Marlboro Police Headquarters. I requested my headquarters in Boston to locate Mr. Painten and to bring him to Marlboro, if he wanted to come, for the [51] purposes of identifying him as a possible robber.

Q. Let me interrupt you for a second. Do you know or could you remember the date of your request? I know it is rather hazy. A. I think it was around the 21st of March, 1958.

Q. If that is true, then it would be subsequent to the events which have been testified to by Officer McNamara? A. A couple of weeks later.

Q. Continue, please?

The Court. Wait a minute.

[The preceding questions and answers of Lieutenant Crowley are read.]

Q. Now, Lieutenant Crowley, did you know about the events which had transpired in Boston at the time you made the request? A. Yes, sir.

Q. Was this part of the basis for your making this request? A. Yes, sir.

Q. Did you know about the money that had been discovered? A. Yes, sir.

Q. Did you know about the guns that had been discovered? A. Yes, sir.

Q. Would you continue with your story, please? A. The money that had been taken from under the mattress, [52] and which he had agreed was his money, all of the serial numbers had been taken by FBI agents, and the first time that they made an examination of the list as against the list of marked money in the Marlboro National Bank, they found two bills in that list of marked money. Then a day later they made another examination of the same list, with the same list of marked money and they found several other bills.

Q. This is prior to your making the request to see Mr. Painten, also, is that right? A. Yes, sir, this is in between.

Q. The incident in Boston? A. The defendant had been picked up in Boston, arrested and the money had been taken back to him, and so forth.

Q. Fine. A. The guns were wrapped up in a piece of cellophane or that wax paper used in a kitchen, and among the things they took out of the house, his home, was a box of wax paper. The ends, the torn edges of the wax paper matched exactly the torn edges of the box in his closet or his pantry. For those reasons, I wanted him to come out and be identified, if possible.

[53] Q. All of this took place, you say, around the 20th, the 21st of March? A. Yes, sir.

Q. Prior to this, Lieutenant Crowley, had there been an arrest of another suspect in the Marlboro Bank robbery? I refer to Mr. Bratkon, Lieutenant. A. Yes, there had been an arrest, yes.

Q. Prior to this, prior to your talking, making the request to see Donald Painten, had you interrogated Mr. Bratkon, Lieutenant? A. Yes, I had.

Q. Could you tell us, if you remember, sir, whether or not during the interrogation of Mr. Bratkon, he made statements indicating the petitioner here, Donald Painten? A. Yes, sir.

Q. This is now one of the factors you considered in asking to see Mr. Painten, is that correct? A. Yes, sir.

Q. Did Mr. Painten in fact go to Marlboro—was it, or Hudson? A. Marlboro.

Q. Did he in fact go to Marlboro to see you? A. Yes, sir.

[54] Q. Did you interrogate him there? A. Yes, sir.

Q. Would you give us the substance of that interrogation, if you remember? Before you answer that, Lieuten-

ant, may I ask you this? Did you advise Mr. Painten of his rights at that time? A. No, sir.

Q. Was it in your mind at this time, if you remember, to make an arrest? A. No, sir.

Q. You merely wanted to interrogate him, is that correct? A. That is right. I talked about the robbery and about his whereabouts. He told me that on the day of the robbery he was at the laundramat on Appleton Street. He told me that he had put down $50 for a deposit on the laundramat, he was going to work it with his father. He told me that he spent some of the time between 11 and 2, whatever time was involved in the robbery, at Kelley's Spoft Life Cafe. He denied being present at the robbery. I brought the various people in the bank to identify him.

Q. Did you at this time confront the petitioner with [55] the information concerning the money found in his apartment? By that I mean the serial numbers being the same as those taken from the People's National Bank in Marlboro? A. Yes, I did.

Q. He denied it? A. He denied it, could not understand how the money could get there.

Q. He could offer no explanation? A. I also told him at the Federal Reserve Bank they had sent the money out to the People's National Bank within a week, as I remember it, before the robbery of the bank, and that it was at least odd that the several bills were found together and separated in the whole bunch of bills that he had. The robbery of which Mr. McNamara spoke was a robbery that was just under $1,000. He explained that he had made a loan at some credit union in Chelsea or Revere. I checked that loan company. I found that he had made a loan a long time before.

Q. A long time before? A. That is my memory.

Q. Now, in view of all of this evidence that you confronted [56] him with, he still denied that he had anything

to do with the People's National Bank robbery? A. He denied all knowledge of the guns. He denied that they were George Ash's guns. He denied completely knowledge of any kind having to do with the guns or ammunition.

Q. He denied that the guns were his and they did not belong to George Ash, also? A. That is right.

Q. Have you been sitting in the court room all morning? A. Yes, sir.

Q. Did you hear Mr. Painten testify earlier the guns belonged to George Ash? A. Yes, sir.

Q. What else did you confront the petitioner with at this time, if you remember? A. I confronted him with the pieces of paper, the box of paper, and the sheet of paper.

Q. You stated where it was torn, it seemed to match the wax paper that was in the box? A. Yes, sir.

Q. You stated this wax paper was paper taken from the petitioner's apartment? [57] A. Yes, sir. There were many, many more questions and answers that escape me at the moment.

Q. Let me ask you this, Lieutenant? Did you confront the petitioner as a result of your investigation, with the co-defendant Bratkon? A. Yes, sir.

Q. Did he deny knowing Mr. Bratkon? A. Yes, sir.

Q. He said he did not even know Bratkon? A. That is right.

Q. Now as a result of the interrogation of the petitioner, Lieutenant, did you subsequently arrest him? A. Yes, sir.

Q. Did you arrest him that very day? A. The next day, a continuing proposition, after I finished talking with him, I kept him all of the time.

Q. He never left you before he was arrested, is that right? A. No.

Q. But it was as a result of this interrogation and other extrinsic evidence that you did arrest him, is that right? A. That is right.

Q. Were you present at the trial, Lieutenant? A. Yes, sir.

[58] Q. In fact, the guns that were mentioned earlier, were they introduced in evidence? A. Yes, sir.

Q. There was also some evidence of a .32 caliber bullet being introduced, do you recall this? A. I remember the introduction of several individual bullets, yes. One of them was a .32, I am reasonably sure.

Q. Do you remember whether or not Mr. Painten had a gun? A. No, I don't.

Q. Was there a car ever involved in the course of this investigation with the registration number, 129510 for 1958, I believe it was a 1954 Dodge? A. I don't remember. If I am not mistaken—

Q. You don't remember? A. Not from that description of it. I have a memory of a Dodge. Where it came into the picture—is that a stolen car, is that the one that was stolen?

Q. That is correct. A. Yes, I remember that now.

Q. Do you remember—I realize that this is some time ago—and if I may say here, your Honor, I was not able to locate the agent who gave this testimony at the trial, this is why I am trying to exhaust Lieutenant Crowley's memory—

[59] The Court. All right.

Q. Do you remember the testimony concerning the stolen car by the Special Agent who searched the car?

The Court. The FBI Agent?

Mr. Davis. It was an FBI Agent, yes, your Honor.

The Witness. Was that Dailey?

Mr. Davis. Bailey, yes.

The Court. Portland, Maine.

Mr. Davis. He did not have too much time.

The Witness. Bailey. I remember him having searched the car. He found a .32 bullet in the car, in the stolen car. It did not belong to the owner of the car.

Q. There was also a .45 caliber bullet introduced in evidence. Do you remember the circumstances surrounding that? A. I think I do. The holdup car pulled up to the side of the road and there was a switch, and some bullets fell out of his pocket, on the ground. They switched drivers, as I remember it. The car took off. The man in the house came out and picked up a bullet or two that had fallen out of it. I forget whether he identified the man or not.

Q. At the time, Lieutenant Crowley, was there evidence [60] concerning the money found in the petitioner's apartment in connection with the serial numbers that had been money stolen from the People's National Bank? A. Yes, sir.

Q. Who introduced that evidence, do you remember? A. Let me see, I think it was Special Agent Condon.

Q. Did you testify at the trial, Lieutenant? A. Yes, sir.

Q. Could you give us the substance of his testimony, if you remember it, in narrative form?

Mr. Davis. According to my brother, he will stipulate what is in the transcript is correct.

The Court. All right.

Mr. Davis. I have no further questions.

The Court. O.K.

Mr. Nordlinger. Just a couple of questions, your Honor. I am not going to prolong this.

The Court. All right.

[61] *Cross-Examination*

XQ. [By Mr. Nordlinger] First of all, sir, you gave some testimony regarding the bank, the money in the bank in Marlboro, and so on. I want to ask you, briefly—

The Court. Let me ask you this, before you ask the Lieutenant any questions, I thought the second part of this

hearing was in regard to the allegations of the search of the apartment. Frankly, Mr. Davis wandered off to some extent. The materiality of it escapes me, on some of it, but go ahead.

Mr. Nordlinger. All right, sir.

The Court. I am not saying you cannot ask any questions you want. The hearing was addressed to the two paragraphs. I don't think the Lieutenant has much—

Mr. Nordlinger. I don't think—

The Court. What do you have in mind?

Mr. Davis. There was that, there was an allegation the money was seized from the petitioner's apartment. Also, the guns were introduced into evidence at the trial, the People's National Bank. Officer McNamara was not involved and Lieutenant Crowley was. [62] It was through him I had to get in the items seized in the apartment. They were in fact introduced in evidence. There is nothing in the transcript.

The Court. I don't think you better challenge the fact the bills were introduced in evidence.

Mr. Davis. There was nothing in the transcript to indicate how the bills were obtained.

Mr. Nordlinger. The petitioner has asked me to call to the Court's attention the serial numbers were introduced, and not the physical bills, the serial numbers.

The Court. All right.

Mr. Nordlinger. Your Honor, I have no further questioning of this witness.

The Court. All right.

Mr. Nordlinger. At this time—I am sorry, I do not know whether the Commonwealth has finished.

Mr. Davis. We have no further witnesses.

The Court. All right.

Mr. Nordlinger. If your Honor please, at this time I would like to make a request of your Honor, and I believe

my brother counsel for the Commonwealth would like to join in this request. Rather than get [63] involved in an argument on all the merits of this petition, we would like to have time to draw up a memorandum to submit to your Honor on this.

The Court. How much time do you want?

Mr. Nordlinger. I am reminded of what I saw in a court room a couple of days ago, the attorney asked for the maximum time. I would like to have at least ten days to do this.

The Court. Name the time. Talk to your brother a minute. Maybe you can agree on that. Have you got a time?

Mr. Nordlinger. Your Honor, if possible, we would like to have thirty days.

The Court. January 28th or February the 1st, Friday.

Mr. Nordlinger. January 28th should do it.

Mr. Davis. I will do that, your Honor, yes, I will.

The Court. January 28th or February 4.

Mr. Davis. Try February 4.

Mr. Nordlinger. All right, your Honor.

Mr. Davis. Your Honor, this is to be limited to what we argued this morning?

The Court. Right.

[Adjourned.]

CERTIFICATE

I, Edward J. Grace, Official Reporter in the United States District Court, do hereby certify that the foregoing transcript from Pages 1 to 63, inclusive, constitutes to the best of my skill and ability a true and accurate transcript of my shorthand notes taken in the above-entitled action.

EDWARD J. GRACE

Opinion.

March 31, 1966

CAFFREY, D.J.

Petitioner Donald M. Painten was tried by a jury in the Superior Court of the Commonwealth of Massachusetts and convicted of conspiracy to steal property, the theft of one automobile, and armed robbery, masked and disguised, of the Peoples National Bank, Marlboro, Massachusetts. He was sentenced to twenty years in the Massachusetts Correctional Institution at Concord on the bank robbery conviction, ten years for the automobile theft, to be served concurrently with the twenty year sentence, and two years on the conspiracy conviction, the two years to take effect from and after the expiration of the other sentences. He is now serving these sentences.

Painten's conviction was affirmed by the Supreme Judicial Court of Massachusetts in an opinion reported at 342 Mass. 740 (1961). Thereafter he filed a petition for a writ of error in the Supreme Judicial Court. The petition was denied after a preliminary hearing. Petitioner subsequently filed the instant writ of habeas corpus in this court.

Petitioner alleges eight separate assignments of error which he feels establish that his imprisonment is illegal and in violation of the Fourteenth Amendment. It appears that all of these contentions have been raised before the state court either on appeal or in petitioner's writ of error.

By agreement of counsel the case was initially submitted to this Court for decision on the basis of a portion of the record from the Middlesex Superior Court. Thereafter, *sua sponte,* the Court ordered the parties to file a complete state court record. Still later, after a review of an 1161-page transcript of the trial held in Middlesex Superior Court, this Court *sua sponte* ordered an evidentiary-type hearing with reference to two of Painten's contentions, (1) that he had been prejudiced by the admission at the

trial of articles seized by the police in the course of an illegal search of his apartment, and (2) that he had been denied equal protection of the law on the basis of his confinement in a prisoner's cage in the Superior Court courtroom. This opinion will first consider those of Painten's contentions which are resolvable on the basis of the state court record and will conclude with consideration of the two contentions as to which evidence was offered in this court.

Painten's first assignment of error is that the trial judge erred in failing to grant his motion for bills of particulars. The Supreme Judicial Court thoroughly considered this point and held that the indictments were in the language of the statute and that they were sufficient, fully, plainly, substantially, and formally, to set out the charges against him. There was no denial of federal rights in this ruling.

Painten also contends that the amendment in the middle of the trial of the indictment charging him with larceny of an automobile denied him his right to know before trial the essential components of the charge against him. The amendment merely changed the name of the automobile owner to Elora G. Trump from that of her husband John C. Trump. This point was also fully considered by the Supreme Judicial Court, which held that the amendment did not prejudice the defendant. There was no denial of federal rights in this ruling.

The next assignment of error is that the trial judge erred in permitting the Commonwealth to defer sentencing of a co-defendant who had changed his plea from not guilty to guilty on some counts of the indictment in the midst of the trial, and by further permitting the Commonwealth to call the said co-defendant as a state's witness immediately after the change of plea and much before the imposition of sentence, thereby prejudicially affecting the testimony of this witness by holding over his head the threat or reward

of a sentence based on his degree of cooperation. There are numerous state and federal decisions holding that a co-defendant who has pleaded guilty is a competent witness even though he has not been sentenced. See *II Wigmore, Evidence,* sec. 580 (3rd ed. 1940). There was no denial of a federal right in allowing the co-defendant to testify.

Painten's next assignment of error is that "The Commonwealth of Massachusetts erred by removing one of the co-defendants from the local jail for the purposes of private interrogation conducted by the Commonwealth's prosecuting attorney after the time indictments had been presented by the grand jury." It is difficult to understand how this action could have infringed Painten's constitutional rights. The co-defendant who was removed from the jail pleaded guilty to the charge during the trial and turned state's evidence. Painten does not allege that the interrogation of the co-defendant was carried out in such a way that the co-defendant's constitutional rights were violated. He does not allege that the co-defendant was coerced or threatened in any manner during his interrogation. In fact, Painten alleges no facts whatsoever which could possibly give rise to any violation of his constitutional rights. He is not entitled to relief on this ground of his petition.

Petitioner's next assignment of error is that during the trial the questioning of one witness elicited testimony that Painten had been in prison. It also appears that during the instruction to the jury the judge referred to the fact that Painten had been an inmate of the Massachusetts Correctional Institution. Petitioner argues that since Massachusetts law provides that a defendant's prier criminal record shall not be disclosed to the jury when the defendant does not testify, and since Painten did not take the stand at his trial, the admission of this testimony relating to his prior imprisonment was a denial of equal protection of the laws.

The transcript of the trial reveals that while Painten's counsel was cross-examining Bratkon, the co-defendant who had pleaded guilty, the following occurred:

Q. Prior to that, when had you last seen him?
A. Like I said, prior to that I seen him in jail.
Q. I asked you when?
A. Around '54. I imagine it was then.

A few moments later the following colloquy took place between the trial judge and the witness:

The Court: When did you last see him before January '58?
Witness: In jail, Your Honor.
The Court: What?
Witness: In jail.
The Court: When was that?
Witness: '54-'55—around there. I don't know exactly the time.

Counsel for Painten made no motion to strike this testimony at any point in the trial; nor did he ever request the trial judge to instruct the jury to disregard the testimony. See *Commonwealth* v. *Walter Edward Early,* Mass. Adv. Sheets (1965) 1303. Under these circumstances, it cannot be said that petitioner was denied equal protection of the laws.

Petitioner next contends that "the trial justice prejudiced petitioner's right to a fair trial by misleading the jury during his instructions to that body at the conclusion of the trial." Specifically, petitioner relies on (1) the trial judge's statement, "I think you will have (with you) Mr. Painten's record. I believe the records were introduced in evidence that he was twice convicted of rape. . . ."; and (2) what the petitioner characterizes as a completely erroneous recollection of a witness' answer by the trial judge in his instruction.

The transcript of the trial reveals that at the conclusion of the charge the erroneous reference to Painten as the man who had been convicted of rape was called to the judge's attention during a conference at the bench. The trial judge then instructed the jury that the records referred to were Bratkon's conviction of the rape of two persons and were offered to impeach his credibility. This corrective charge removed any prejudice which may have resulted to Painten from the jury charge.

As to the contention that the judge stated an erroneous recollection of a witness' testimony in his charge to the jury, it should be noted that the judge had charged the jury that it was their recollection of the evidence that should govern their deliberations, not that of the judge. Furthermore, there was no objection to the portion of the charge which petitioner now claims was erroneous.

This was a long trial, involving four defendants and a number of charges. The trial lasted twelve days. The judge can hardly be expected to have remembered every detail of the evidence. Upon a fair reading of the entire charge it cannot be said that the trial judge so misled the jury as to deprive petitioner of due process of law.

Petitioner's next assignment of error is that articles which had been seized during an illegal search of his apartment were admitted into evidence against him. Before resolving Painten's contentions with regard to illegal search and seizure, the contention of the Commonwealth that Painten is not in a position to obtain the benefits of the doctrine of *Mapp* v. *Ohio,* 367 U.S. 643 (1961) must be considered. The Supreme Court held in *Linkletter* v. *Walker,* 381 U.S. 618 (1965) that the exclusionary rule of *Mapp* did not apply retroactively to convictions which had become final by the date of its decision in *Mapp* (June 19, 1961). The record proves that Painten's conviction was affirmed by the Supreme Judicial Court of the Common-

wealth of Massachusetts on June 9, 1961. Since the time within which Painten could petition for a writ of certiorari had not expired when Mapp was handed down, his conviction was not final as that term is defined in *Linkletter* v. *Walker, supra,* [at 622 n. 5]* and, therefore, evidence obtained through an illegal search and seizure was not admissible in Painten's trial in state court, even though the trial occurred in 1958.

As a corollary it follows that at the time of the trial in Superior Court, *Wolf* v. *Colorado,* 338 U.S. 25 (1949) was still believed by the bar to be good law. For this reason no waiver of Painten's rights under *Mapp* may properly be inferred from the failure of the record to establish an objection by his counsel on the grounds of the illegal search to the admission of the articles about whose admission he now complains. *U.S. ex rel Angelet* v. *Fay,* 333 F.2d 12 (2d Cir. 1964), aff'd. on other grounds, *Angelet* v. *Fay,* 381 U.S. 654 (1965); *United States* v. *LaVallee,* 334 F.2d 331 (2d Cir. 1964); *Dillon* v. *Peters,* 341 F.2d 337 (10th Cir. 1965). It follows that Painten's claim of a violation of his constitutional rights by the illegal search and seizure must be decided on the merits.

On the basis of the state court record and the evidentiary-type hearing held in this Court, I find that on Saturday night, March 1, 1958, Emmett McNamara and Herbert Maxwell, two plainclothes officers of the Boston Police Department, were on patrol in an unmarked police car. About 8:30 p.m., they were traveling along Dartmouth Street behind a Ford sedan occupied by two men in soft, black hats. At the intersection of Dartmouth Street and Columbus Avenue, the sedan crossed Columbus Avenue and pulled up in front of a liquor store while the police car stopped at the traffic light. Since there had recently been a rash of

*See Order, *infra,* p. 59.

liquor store holdups, Officer McNamara kept on eye on the sedan and saw petitioner Painten get out of the car and enter the store. McNamara confirmed his identification from a "mug" shot of Painten which he had in his pocket. The sedan moved slowly up the street, turned around, and was returning as McNamara, his suspicions aroused by the car's movement, crossed the intersection and pulled up before the liquor store. When the driver of the sedan saw Officer McNamara in the unmarked police car he took off down the street with a burst of speed. McNamara wheeled the squad car around and gave chase, using his siren.

After chasing the sedan for several blocks McNamara overtook and stopped it. As he approached the car he recognized the driver, George Ash, whom he knew had been convicted of holdups in the past and had served time in prison. McNamara ordered Ash out of the car and asked him why he had run. Ash said McNamara had "scared" him. McNamara could see that Ash was not carrying a weapon. He looked in the car and after some conversation let Ash go on his way, in the hope that Ash would lead him to Painten. Ash returned in the direction of the liquor store.

McNamara returned to the liquor store and showed Painten's picture to the clerk, who told him that Painten lived in a nearby apartment building. He then drove to the address given by the clerk and in a parking lot behind the apartment building found the car that Ash had been driving. A check of the front door disclosed Painten's name under one of the doorbells. Knowing Painten and Ash, and the reputation of this apartment building, McNamara returned to his car and put in a radio call for two more police officers.

McNamara was interested in Painten and Ash because he considered them likely suspects for a loan company robbery that had taken place earlier on the same day.

McNamara had no information connecting them with the loan company holdup or, for that matter, with any other crime; he had not set out on patrol with Painten or Ash particularly in mind as suspects; on the contrary, his suspicions focused on them only when they crossed his path. McNamara felt that Ash was a likely suspect for the loan company holdup because he had been convicted of holdups in the past and that Painten was a likely suspect because he had a record, though McNamara did not know what it was. McNamara had seen Painten in the company of men that he knew from police work. The only description of the holdup men which McNamara had available was that they were "two white men, one tall, one a little shorter." As Officer McNamara candidly admitted, there were "plenty of other fellows around the South End that could possibly have gone into the same category" as Painten and Ash if they had come across his path.

When Officers Megnia and Rufo arrived at the apartment building in response to his call, McNamara told them he and Maxwell were "going up to see some fellows up in an apartment, if we can find them," and sent Rufo to watch the rear of the building. McNamara, Maxwell and Megnia then approached the apartment building, found the outer door unlocked, and entered. Leaving Megnia to guard the stairway, McNamara and Maxwell went to Painten's third floor apartment and knocked on the door. Painten answered the door, opening it only a few inches, and asked "Who's there?" McNamara showed his badge and replied, "It's the Boston Police. We'd like to talk to you." Painten asked if they would wait a minute, McNamara replied that they would, and Painten closed the door. While the door was closed McNamara heard what sounded like a window being raised and lowered inside the apartment. A few seconds later Painten opened the door. McNamara and Maxwell entered the apartment.

Inside, in the kitchen, they found George Ash and a woman identified as Doris Painten. Painten stated that the apartment was his. Noticing a bulge in Ash's pocket McNamara stuck his hand into it and found about $200.00 in ten and twenty dollar bills stuffed in the pocket. There was some conversation between McNamara and the occupants of the apartment. No search of Painten's person or his apartment took place at this time.

In the meantime, from his vantage point behind the building, Officer Rufo had seen someone open a window in Painten's apartment and drop a bag onto the fire escape. The two kitchen windows of Painten's apartment faced the back of the building. On the third floor level, the fire escape extended to a point on the wall about midway between these two windows. On the second floor level, however, the fire escape extended to the edge of the building, so that it was directly under the corner window of Painten's kitchen, the window from which the bag was dropped. The bag fell to the second story fire escape and landed with a metallic clang. As soon as the window was closed, Officer Rufo went around to the front of the building, entered, went up to Painten's apartment, into the kitchen, and told McNamara "They threw a bag out the window." About three minutes had passed since McNamara's entry into Painten's apartment.

While McNamara, Maxwell and Megnia kept an eye on Painten and Ash, Rufo raised the venetian blind, opened the window, stepped out onto the fire escape, went down the ladder to the second floor level, picked up the brown paper bag and started to rip it open. He saw the muzzle of a .45 and immediately returned to Painten's apartment. In the kitchen McNamara opened the bag and discovered, wrapped in three sheets of waxed paper, a .32 caliber automatic and a .45 caliber revolver, together with nine .32 caliber bullets and thirteen .45 caliber bullets scattered about

the bag. He asked whether anyone knew anything about the pistols and Painten responded that he knew nothing about them. McNamara then placed Painten under arrest "for suspicion of a holdup on a loan company," and proceeded to make a thorough search of the apartment.

During the search, McNamara discovered and seized a box of .32 caliber shells found on a kitchen shelf and about $980.00 found under the mattress in Painten's bedroom. Painten was still in the apartment when these articles were seized. After the arrest more police were called in and Painten and the others were taken to Station 4. Some time after Painten had been taken to the station, exactly how long does not appear in the record, except that it was later in the same evening, the police found and seized a roll of waxed paper. The roll of waxed paper, the sheets of waxed paper, the paper bag, the guns, the ammunition, and the money were all taken to the station. Over the weekend, FBI agents made a list of the serial numbers of the money found under Painten's mattress.

At Painten's trial in state court, all these items except the money were introduced into evidence. There was testimony that the bag with the guns and ammunition had been thrown from Painten's apartment and recovered from the fire escape. There was testimony that the roll of waxed paper came from Painten's apartment and that the sheets of waxed paper in which the guns had been wrapped were torn from this roll. There was testimony that the box of .32 caliber bullets was found in Painten's apartment. The serial numbers of some of the money taken from Painten's apartment were read into evidence and there was testimony that these serial numbers matched those of bills that had been taken in the robbery of the Peoples National Bank. There was testimony that the serial numbers had been taken from money found in Painten's apartment.

I rule, on the basis of this record, that Officer McNamara did not have probable cause to arrest Painten when he went

to Painten's apartment and sought entrance thereto. All that he knew when he knocked on Painten's door was that Painten had some sort of a record and that he had seen Painten in a car with Ash who he knew had a record for holdups. I find that the officers went to the apartment intending to ask Painten a few questions and then to arrest him "on suspicion of the loan company job." In so finding I have in mind the statement by Officer McNamara at the hearing here that if Painten had not gone from the car into the liquor store he would have asked him and Ash a few questions and then "I believe I would have taken them to Station 4 on suspicion of that holdup that day." I likewise have in mind that the calling of additional officers by radio and the placing of officers to guard both front and rear exits of the apartment building is far more indicative of a planned arrest than of an intended interview.

It follows that the entrance into Painten's apartment without a warrant and absent any probable cause to arrest any occupant thereof was "under color of their police authority" (*Johnson* v. *United States*, 333 U.S. 10, 16 (1948)) and there was no "valid basis in law for the intrusion." Id., p. 17.

Since the officers had no probable cause to arrest when they entered the apartment they cannot retroactively validate the entry or arrest by reliance on what they discovered as a result of the illegal entry. *Johnson* v. *United States*, *supra*, at p. 16. "'A search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from' what is dug up subsequently." *Ker* v. *California*, 374 U.S. 23, at 41 n.[12],* quoting *United States* v. *DiRe*, 332 U.S. 581, 595 (1948).

I rule that the guns, bullets, sheets of waxed paper, roll of waxed paper, paper bag, and the serial numbers of the bills obtained during the course of the search were all ob-

*See Order, *infra*, p. 59.

tained in violation of Painten's constitutional rights and that their use as evidence at his trial was a denial of his constitutional rights.

In view of this disposition of the allegation of illegal search I do not reach Painten's contentions with regard to the "cage" located in the Middlesex Superior Court courtroom. In any event, these contentions will be moot on retrial since the cage has been removed from the Middlesex Superior Court courtroom.

The petition for writ of habeas corpus is allowed and the Commonwealth of Massachusetts is directed to either bring Painten to a new trial on these charges within sixty days from the filing of this opinion or to discharge him from custody.

ANDREW A. CAFFREY,
U. S. District Judge

Order.

March 31, 1966

In conformity with Opinion of the Court filed this date, it is ORDERED:

1. The judgment of conviction on the basis of which petitioner is in custody is vacated.

2. That the Commonwealth of Massachusetts bring petitioner to a new trial on these charges within sixty days from this 31st day of March, 1966, or discharge him from custody.

By the Court,
HOPE K. CONNELL
Deputy Clerk

ANDREW A. CAFFREY
United States District Judge

Motion for Stay.

[Filed April 5, 1966.]

Now comes the respondent in the above-entitled cause and moves that this Court order a stay of the order commanding the Commonwealth of Massachusetts to bring the petitioner to trial within sixty days or to discharge him from custody, pending the appeal of the respondent to the United States Court of Appeals for the First Circuit.

By its attorney,

EDWARD W. BROOKE,
Attorney General
By: JOHN S. BOTTOMLY
Assistant Attorney General
Chief, Criminal Division
WILLIE J. DAVIS
Assistant Attorney General

April 7 1966 Motion Denied
ANDREW A. CAFFREY
District Judge

Notice of Appeal.

[Filed April 5, 1966.]

Notice is hereby given that the Commonwealth of Massachusetts, respondent in the above-entitled action, hereby appeals to the United States Court of Appeals for the First Circuit from a Judgment by Justice Caffrey entered on March 31, 1965 ordering that the Commonwealth of Massachusetts bring petitioner to a new trial within sixty days

from 31st day of March, 1966, or discharge him from custody.

By its attorney,

EDWARD W. BROOKE,
Attorney General
By: JOHN S. BOTTOMLY
Assistant Attorney General
Chief, Criminal Division
WILLIE J. DAVIS
Assistant Attorney General

Motion for Issuance of Certificate of Probable Cause under Rule 87 (A) and Section 2253 of Title 28.

[Filed April 5, 1966.]

Now comes the respondent in the above-entitled action and moves that this Honorable Court issue a Certificate of Probable Cause to permit it to appeal to the Court of Appeals from the order to bring the petitioner to trial within sixty days or to discharge him from custody.

Respectfully submitted,

EDWARD W. BROOKE,
Attorney General
By: JOHN S. BOTTOMLY
Assistant Attorney General
Chief, Criminal Division
WILLIE J. DAVIS
Assistant Attorney General

Motion allowed April 7 1966
AAC D.J.

Order.

April 11, 1966

The Opinion filed herein on March 31, 1966 is amended as follows:

On page 8, line 10, by inserting after the word *supra* "at 622 n. 5."

On page 16, line 7, by striking "5" after 41 n. and substituting "12" therefor.

ANDREW A. CAFFREY
U. S. District Judge

[fol. 60]

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

On April 13, 1966, the Commonwealth of Massachusetts, appellant, filed a Motion for Stay Pending Appeal.

Thereafter, on April 21, 1966, an order was entered granting the stay pending appeal and providing that Donald M. Painten, appellee, may move for admission to bail in the District Court.

Thereafter, on May 3, 1966, appellee filed a Motion to Have Case Remanded to District Court for Hearing as to Bail.

Thereafter, on May 6, 1966, without objection, an order was entered remanding the case to the District Court for the limited purpose of hearing and entertainment of a motion for bail pending appeal.

Thereafter, on May 31, 1966, supplemental record on appeal was filed containing motion to be admitted to bail and opinion and order of the District Court denying same.

Thereafter, on July 7, 1966, appellee filed a motion to be admitted to bail which was denied by order of Court on July 20, 1966.

Thereafter, on September 13, 1966, this cause came on to be heard, and was fully heard, by the Court, Honorable Bailey Aldrich, Chief Judge, and Honorable Edward M. McEntee and Honorable Frank M. Coffin, Circuit Judges, sitting.

[fol. 61]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6720

COMMONWEALTH OF MASSACHUSETTS, Respondent, Appellant,

v.

DONALD M. PAINTEN, Petitioner, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[252 F.Supp. 851]

Before Aldrich, Chief Judge, McEntee and Coffin, Circuit Judges.

Willie J. Davis, Assistant Attorney General, with whom Edward W. Brooke, Attorney General, was on brief, for appellant.

Louis M. Nordlinger for appellee.

OPINION OF THE COURT—November 10, 1966

ALDRICH, Chief Judge. Petitioner was convicted in the state court of armed robbery and various connected offenses, and was given extensive sentences. His conviction was affirmed *sub nom. Commonwealth* v. *Binkiewicz*, 1961, 342 Mass. 740. Thereafter he sought a writ of error in the state court, raising, for the first time, the matters now before us. The writ was dismissed. Having thus exhausted his state remedies, he filed a petition for habeas

corpus in the district court. The writ was granted, *Painten* v. *Commonwealth*, D. Mass., 1966, 252 F.Supp. 851, and the Commonwealth appeals.

[fol. 62] It is necessary for us to consider only one of petitioner's contentions. In upholding the writ on this ground we rely upon the findings of the district court, which appear at 252 F.Supp. 855-56, except for the recitation of a conversation, more precisely set out hereafter, that took place when the police knocked at the petitioner's door. Very briefly, two policemen, knowing of a holdup but having no substantial clues, came across petitioner and one Ash, and followed them to petitioner's apartment. Their grounds for suspicion did not, even remotely, amount to probable cause for arresting either Ash or petitioner, either for the holdup or for any other crime. After arranging for plainclothesmen to station themselves at the back of the building, one of the uniformed officers then knocked on the door. He testified as follows:

> "I rapped on the door, and a voice said, 'Who is it?' I said, 'Police officers.' The door opened about three inches, and Mr. Painten looked out at me. He saw us. I had my badge in my hand. He said, 'Will you wait a minute?' I said, 'Sure.' He closed the door. As he closed the door, maybe ten seconds later I heard what to me sounded like a window opening and closing. He then, a few seconds after the door was opened, we were allowed to enter. . . . I asked who lived there. Painten volunteered it was his apartment."

After entering the apartment, the police noticed a bulge in Ash's pocket, and removed some $200 in crumpled bills. They then called to the plainclothesmen to come up, and received the response that "someone" had thrown "something" out the window. This information led to the discovery on the fire escape on a floor below of a paper bag containing two pistols and some cartridges.

[fol. 63] Petitioner was thereupon arrested; the apartment was searched, and a large amount of currency was found under a mattress. At petitioner's trial the guns and bills were introduced in evidence.

Although these events took place in 1958 it is conceded that petitioner is in a position to obtain the benefits of the doctrine of *Mapp* v. *Ohio,* 1961, 367 U.S. 643.

This case falls over the permissible line that we recently sought to delineate in *Robbins* v. *MacKenzie,* 1966, 364 F.2d 45, *cert. den.* 10/17/66. In that case the district court found, on adequate evidence, that no search was intended. We held that where the police, having reasonable suspicion but not probable cause, knocked on a door and asked to talk, and had no other purpose, they were entitled to treat an invitation to enter as voluntary consent. Our discussion need not be repeated, but we distinguished cases where the purpose of the police was not merely to talk, but to make a search.

In the case at bar the police sought entry without stating their purpose. If this was a request to make a search, acquiescence when police knock and exhibit a badge is not true consent to a search, as the cases cited in Judge Coffin's dissenting opinion in *MacKenzie* make clear. The Commonwealth's own evidence indicates that a search was in fact intended. In addition, the district court found that the police purpose was to arrest petitioner, although they had no warrant or ground for obtaining one. The Commonwealth disputes this appraisal of the testimony, and the correctness of the court's finding as to purpose, but its own police officer, with commendable candor, testified as follows:

> "Q. Was it your opinion . . . something was going on in that household to give you reason to enter the household without a warrant?" A. "Yes, sir . . . [fol. 64] in that household, it has people with a background, people that I knew were in there, I might be able to solve a string of serious crimes."

This suggests to us a proposed investigation surpassing mere dialogue. When asked a second time his reason for seeking to enter, the officer testified,

> ". . . . now we have them [Ash and petitioner] together in the apartment and the holdup of the loan company is in my mind now . . . and I find out he is living there, these things in my mind lead me to arrest him for that holdup."

It is apparent that the police, knowing of a crime and knowing that Ash and petitioner were suspicious characters, but having no reason to connect them with the crime they were investigating, set out to arrest and search the men in the hope that evidence would develop. It is precisely such tactics that the Fourth Amendment makes unlawful.

It follows that, as the court said in *Hobson* v. *United States,* 8 Cir., 1955, 226 F.2d 890, at 894, "The defendant's action in throwing the package was not voluntary but was forced by the actions of the police," and since their actions were improper, the police were not entitled to the fruits. The state could not use the guns, even as probable cause, if they were such, to justify their subsequent conduct in making an arrest, or the search in which they discovered the money. *Wong Sun* v. *United States,* 1963, 371 U.S. 471, 482-84.

Affirmed.

[fol. 65] COFFIN, Circuit Judge (concurring). While I concur with my brothers in the result reached by them, I differ as to the path taken to reach it. I would link the inadmissibility of the guns and bullets not to the officers' request for entry, whether lawful or not, but rather to the later, unauthorized exercise of dominion over petitioner's apartment when an officer used it as a conduit of convenience for seizing the bag on the fire escape. That

the officers could have obtained the bag without invading petitioner's premises does not cure the defect. The mere fact that officers had previously gained access to the apartment, even if lawfully, and were conversing in it with petitioner did not, in my view, provide another officer with license to use it as a thoroughfare.

Without the guns and bullets contained in the bag, there was no probable cause for any arrest or subsequent search.

What troubles me about the opinion of my brothers is their reasoning that, since the officers harbored an improper purpose, their knocking on the door and identifying themselves was also "improper" and immunized from use any objects jettisoned into public view and beyond petitioner's premises. I would not go so far as to say that such preliminaries could shield evidence later discovered if it were obtained without going on the premises of a suspect. Such a holding, it seems to me, would open the door unnecessarily to claims of immunity buttressed on routine and proper investigatory actions of police. Even if the request to enter in this case was improper, it by no means follows that that conduct alone was so shocking as to taint evidence virtually handed to the officers on a silver platter or, in this case, on an iron grating.

[fol. 66]

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

JUDGMENT—Entered November 10, 1966

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court:

Roger A. Stinchfield, Clerk.

Enter: Aldrich, Ch. J.

Thereafter, on November 17, 1966, appellant filed a motion for stay of mandate.

Thereafter, on November 18, 1966, appellee filed a motion to be admitted to bail.

Thereafter, on November 22, 1966, a Memorandum and Order of Court was entered giving appellant, Commonwealth of Massachusetts, five business days to elect to (1) retry appellee to commence not later than January, 1967, or (2) seek certiorari in which event appellee will be admitted to bail.

Thereafter, on November 29, 1966, appellant filed an election to apply for certiorari; and thereupon an order was entered staying mandate.

[fol. 67] Thereafter, on November 30, 1966, an order was entered directing that appellee be admitted to bail pending proceedings in the Supreme Court of the United States

upon petition for a writ of certiorari, the amount of the bail to be determined by the District Court, after hearing, in the light of all factors it deems pertinent to the extent of the risk.

[fol. 68] Clerk's Certificate to Foregoing Transcript (omitted in printing).

[fol. 69]

SUPREME COURT OF THE UNITED STATES

No. 929—October Term, 1966

MASSACHUSETTS, Petitioner,

v.

DONALD M. PAINTEN.

ORDER ALLOWING CERTIORARI—February 20, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.